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CLERK US DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY: DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

JEFFREY W. BROWN; dba B&B /PRECEDENT – DEFY PRODUCTION; dba B&B PRODUCTIONS AND TECHNOLOGIES, dba B&B TECHNOLOGIES,

Plaintiff,

vs.

adidas USA, Inc., aka adidas America, Inc.,

Defendant.

CASE NO. 95-CV-3866 H (POR)
ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER ENTRY OF SUMMARY JUDGEMENT IN DEFENDANT'S FAVOR; GRANTING PLAINTIFF'S REQUEST TO FILE UNDER SEAL REPLY DATED SEPTEMBER 9, 1998; DIRECTING THAT THIS ORDER BE FILED UNDER SEAL; TERMIN ATING CASE
(Doc. # 177)

Plaintiff Jeffrey Brown (Brown) moves this Court to reconsider its decision dated August 3, 1998 (the

Summary Judgement Decision) granting defendant adidas's motion for summary judgement and denying Brown's cross-motion for summary judgement. Having carefully reviewed the papers submitted and the law, and for the reasons stated herein and in the Summary Judgement Decision, the Court denies Brown's motion to reconsider.[1] Because this order discloses the proprietary and confidential information of Brown, adidas, and ESN, the Court directs the Clerk of Court to file this order under seal. If Brown wishes to appeal this court's ruling, he must file the notice of appeal in compliance with Fed.R.App.3 & 4(a).

BACKGROUND

adidas is a corporation that manufactures and markets athletic footware. Brown is one of the principals of B&B Technologies, LLP.[2] In 1991, Brown approached

[1]The Court held a lengthy hearing on adidas' previous motion for summary judgement on February 9, 1998. Based on its familiarity with this matter and the issues presented, the Court exercised its discretion under Local Rule 7.1(d)(1) to decide plaintiff's motion without oral argument. Because argument is not required to resolve this motion, the Court denies Brown's request for oral argument.

[2]The Court repeats the factual background from the Summary Judgment Decision.

adidas with an outsole system for athletic shoes called DAMPS, (delayed action motion propulsion system). This system contains springs and magnets in the heel of the shoe to cushion impact. Brown applied for and recieved a patent for DAMPS which issued on April 2, 1996.[3] (*Brown, Ex. 3*). On September 30, 1991, Brown signed a non-disclosure agreement with Gary Wakley, an employee of adidas, and executed a second agreement on December 19th 1992. (*Brown, Exs. 9-10*). Brown also signed a one-page , non-disclosure agreements with Dr. Luthi and Dr. Ned Fredericks, employees of adidas, on May 15th 1992. (*Brown, Ex. 19*). These non-disclosure agreements essentially provide that any material Brown submitted to adidas would remain confidential. adidas

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[3]Brown filed his notice of appeal more than 30 days after the district court entered judgment for defendants-appellees. Because Brown filed his motion for reconsideration more than ten days after the entry of judgment, the motion did not toll the time for Brown to file his notice of appeal. *See* Fed. R. App. 4(a)(4); Fed. R. Civ. P.(a). Consequently, Brown's notice of appeal is untimley as to the merits of the summary judgment and timely only as t the district court's denial of Brown' motion for reconsideration. *See Molloy v. Wilson*, 878 F. 2d 313, 315 (9th Cir. 1989).

evaluated DAMPS and reported to Brown that it was not interested in his technology.

Dr. Luthi informed Brown on June 23, 1992 that adidas wished to test the outsole material used in DAMPS. (*Brown, Ex. 13*) Brown's material contains a mixture of polyisoprene, polybutadiene, and various secondary ingredients. (*Brown Ex. 1*) Polyisoprene rubbers are solution-polymerized polymeres made of either natural (air dried sheets) or synthetic isoprene. Ploybutadiene is a synthetic solution-polymerized polymere that has been used as an ingredient in shoe outsoles since before 1970. On July 9 1992, Brown sent four samples of the outsole material to adidas for testing (the plaque sample). (*Brown, Ex. 13*). Brown testified, however, that he did not provide adidas with the recipe for the plaque sample. (*Benson Declar. II, April 20, 1998, Ex. D, at 199*); (*Luthi Declar., 36*). Pursuant to Brown's confidentiality agreements, adidas agreed not to use the sample, except for evaluation purposes. (Brown, Ex. 10).

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adidas tested the plaque sample and concluded that it failed the abrasion and density requirements for the outsoles of its athletic shoes; Dr. Luthi informed Brown on August 31, 1992 of these results. (*Luthi Declar.*, ¶¶ *23-24*). In January 1993, Dr. Luthi let Brown know that adidas was not interested in his reformulation of the plaque sample. (*Brown, Ex. 14*); (*Luthi Declar.*, *29*).

adidas started development on the Predator soccer shoe in late 1991. The shoe is based on the patented design of Craig Johnston, a professional soccer player. (*Brown, Ex. 12*). The fins or rubber strips on the Predator shoe, which are located at the kicking-contact area of the shoe, are designed to assist soccer players impart spin on the ball as they kick it. adidas contacted several European suppliers to develop a suitable rubber for the Predator fin. (*Klar Revised Declar.*, ¶ *10*). adidas eventually hired ESN, which developed the fin material based on its proprietary recipe for the pads of table tennis paddles. (*Weigl Declar.*, ¶¶ 5-7, *Ex. C*). adidas submitted

ESN's proprietary recipe and the final recipe for the Predator fin to demonstrate their similarity.

In his second amended complaint, which he filed on July 18, 1996, Brown alleges that adidas used his plaque sample to develop the recipe for the Predator fins. This Court denied Brown's motions for summary judgement on November 24, 1997 and and January 23, 1998. On February 12. 1998, the Court denied adidas' motion for summary judgment and Brown's motion to reconsider the January 23, 1998 ruling. At the February 9, 1998 hearing, the Court explained to Brown his burden under Celotex and that it appeared from his opposition papers that he had not proffered sufficient evidence to raise a triable issue of material fact with respect to his allegation that adidas misappropriated his polybutadiene recipe. To provide Brown an opportunity to gather and submit additional evidence in this matter, the Court extended the discovery cut-off date for approximately sixty days.

On March 18, 1998, Brown submitted his third

motion for summary judgment, which the Court denied on April 21, 1998. In April 1998, the parties cross-moved for summary judgment. The Court conducted a hearing on these cross-motions on Tuesday, May 26, 1998. In an order dated July 27, 1998, the Court exercised its discretion under Local Rule 7.1(d)(1) to decide the parties' cross-motions without oral argument. On August 3, 1998, the Court granted adidas' motion for summary judgement and denied Brown's cross-motion for summary judgment.

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On August 17, 1998, Brown filed a motion to reconsider this Court's decision. adidas submitted its opposition on August 31, 1998; Brown filed his reply on September 9, 1998.

DISCUSSION

In his moving papers, Brown failed to cite any authority or provided any ground to support the filing of his motion for reconsideration. All Hawaii Tours Corp. v. Polynesian Cultural Center, 116 F.R.D. 645, 648 (D. Hawaii, 1977),

rev'd on other grounds, 855 F.2d 860 (9th Cir. 1988) (movant must demonstrate some reason whythe court should reconsider its prior ruling). As discussed below, Brown has not provided sufficient grounds in his reply papers to support the filing of this motion to reconsider.[4]

A district court may reconsider its order granting a summary judgment motion under either Federal rule of Civil Procedure 59(e) (motion to alter or amend a judgment) or Rule 60(b) (relief from judgment).[5] See School Dist. N. IJ Multnomah City b. ACandS, Inc., 5 F.3d 1255, 1262 (9th Cir. 1993). The district court may reconsider its decision if it "(1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is

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[4]The Court's scheduling order dated September 4, 1998 and Local Rule 7.1(h) clearly provide that any reply memorandum shall not exceed ten pages. S.D.Loc. R. 7.1(h). Brown's reply, however, is almost double that limit.

[5]Federal Rule of Civil Procedure 60(b) provides for reconsideration only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) extraordinary circumstances which would justify relief. Fed. R. Civ. P. 60(b). Brown has not presented any ground under Rule 60(b) to warrant reconsideration.

an intervening change in controlling law." ACandS, Inc., 5 F.3d at 1263 (citations omitted); Trentacosta v. Frontier Pac Aircraft Indus., Inc., 813 F.2d 1553, 1557 & n.4 (9th Cir. 1987); Frederick S. Wyle Professional Corp. v. Texaco, Inc., 813 F.2d 604, 609 (9th Cir. 1985) (movant is "obliged to show not only that this evidence was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence at the hearing.") (citation omitted).

Here, Brown has neither cited any new law in support of his motion nor identified any newly-discovered evidence that was unavailable in the prior proceedings. ACandS, Inc., 5 F.3d at 1262-63; Aircraft Indus., 813 F.2d at 1557 & n.4; Texaco, Inc., 764 F.2d at 609. Given the history of this litigation and the Court's order of February 12, 1998 granting him an extension of time to take discovery, Brown's failure to present all his arguments and evidence in the prior

proceedings is not excusable.[6] Brown had ample opportunity to present his case. A motion to reconsider is not designed to allow a party merely re-litigate issues already decided. See Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). In addition, Brown has not alleged or shown that the Court committed clear error or that its decision was manifestly unjust. For these reasons, Brown's motion to reconsider is improper. The Court will nonetheless address the merits of Brown's arguments.

In its Summary Judgment Decision, the Court concluded that, among other things, adidas established that Brown failed to raise a triable issue of material fact with respect to his misappropriation allegation and that adidas demonstrated an absence of triable fact regarding its independent development of the recipe for the

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[6]adidas asserts that the exhibits Brown submitted with this motion to reconsider were produced prior to the filing of Brown's third and fourth motions for summary judgment and thus were available to him in those proceedings. For a list of the papers Brown submitted in this matter since October 20, 1997, see adidas, Ex. A.

Predator fins. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986); (*Summary Judgment Decision, 8-15, 15-17*). The Court concluded that, even when viewing the evidence most favorably to him, Brown failed to produce more than a "scintilla of evidence in support" of his opposition to adidas' motion. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986).

In this motion, Brown does not present any new evidence or law that would warrant the reconsideration of the Court's Summary Judgment Decision.[7] In its previous order, the Court exhaustively reviewed the evidence presented in this case, including the parties' rubber formulas, the Akron and ECA tests purportedly comparing samples of the parties' materials, and the testimony of the parties' experts interpreting this data. (*Summary Judgment Decision,*

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[7]To the extent presented for the first time here, Brown's objections to certain evidence adidas submitted in support of its previous summary judgment motion are untimely and waived by his failure to raise them earlier. San Antonio Community Hosp. v. Southern California Dist. of Carpenters, 125 F.3d 1230, 1238 n.6 (9th Cir. 1997); see also Wiley v. United States, 20 F.3d 222, 226 (6th Cir. 1994)

at 4-15). Based on its review of this evidence and after considering the entirely of the circumstances, the Court concluded that there was no triable issue of material fact with respect to the misappropriation allegations. (*Id., at 9-15*).

Rather than address the Court's conclusion concerning the scientifically-significant differences between the parties' materials and formulas, which was the focus of his previous summary judgment motions. Brown sidesteps this central issue in his motion to reconsider and attempts to highlight other evidence and arguments. As discussed in the Summary Judgment Decision, such evidence, like the super-ball marketing-link phrase, is not sufficient to meet his Celotex burden when viewed in conjunction with the entire record. (*Summary Judgment Decision, at 15).* In this motion, then, Brown fails to present any material evidence or relevant authority to challenge the Court's conclusion regarding the misappropriation allegations. Any suggestion that Brown revealed the recipe to his alleged

trade-secret formula to adidas is controverted by the clear evidence in the record. (Summary Judgment Decision, at 2, 9-11). In addition, for the reasons discussed in the Court's previous order, Brown's use of polybutadiene in footwear is not a protectable trade secret and does not raise any triable issue of material fact regarding adidas' alleged misappropriation. (*Id., at 4-5 n.2, 8-15*).

Similarly, Brown's reliance on authority outside the Ninth Circuit is misplaced. These cases require a showing of probative similarity between the defendant's product and the plaintiff's alleged trade secret, or involve situations where the evidence in the record clearly established that the plaintiff disclosed the trade secret to the defendant and the defendant used this information to create its product. See, e.g. Sokol Crystal Products v. DSC Communications, 15 F.3d 1427-32 (7th Cir. 1995). This Court concluded in its previous order that neither the analysis of the parties' formulas nor the Akron and ECA tests, when viewed in conjunction with the other

evidence in the record, established a probative similarity between Brown's alleged trade secret and the Predator fin material. Brown's motion and exhibits fail to provide any ground to reconsider the Court's ruling on this issue. (*Summary Judgment Decision, at 9*). The absence of any triable issue of material fact concerning the misappropriation allegation alone requires denial of Brown's motion.

In addition, Brown has not presented any evidence or authority to warrant the reconsideration of the Court's conclusion that adidas established an absence of triable issue of material fact regarding its independent development of the material for the Predator fins. The evidence Brown submitted supports the Court's ruling. (*Id., at 15-17*). The evidence shows that Mr. Johnston's patented shoe design formed the basis for the Predator shoe project, including the development of the fins, and that ESN developed the fin material based on its formula for table-tennis pads.[8]

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[8]As Brown notes in his reply papers, Johnston developed the fin concept in 1991, which pre-dates his contact with adidas. (*Reply, at 9*). Brown does not contend that Johnston obtained any information from him.

(*Browns' Reconsideration Exs., April 23, 1993 Letter From Hartmut Klar, at AD 1275*; (*Id., November 15, 1993 Fax, at AD 623-24*);(*Id., November 24, 1993 Letter From Hartmut Klar, at AD 1965*); (*see also Brown Ex. 5, August 18, 1993 Letter From Hartmut Klar*).[9] The Court concluded in its previous order that Brown failed to provide any evidence to support the allegation that adidas misappropriated the "energy strips" from his DAMPS system. (*Summary Judgment Decision, at 8 n.4*). Brown's arguments regarding the "energy strips" are improperly raised for the first time in this motion and nevertheless fail to create a triable issue of material fact.[10]

[9]Brown Ex. 5 refers to the exhibit filed on April 16, 1998.

[10]Prior to the Court's order granting summary judgment in adidas' favor, Brown focused on the arguments and evidence regarding the alleged similarity between the parties' formulas and materials and identified his trade secret ad the formula for his polybutadiene compound. (*Summary Judgment Decision, at 4-6*); (*Benson Declar. II, Ex. E*). With that theory foreclosed by the Court's Summary Judgment Decision, Brown improperly attempts to shift to another theory that this Court already rejected and that he failed to support. (*Id., at 8 n.4*). Similarly, Brown failed to raise his jurisdiction argument until after the Court granted summary judgment in adidas' favor. (*Reply, at 15*). Jurisdiction is proper with this Court pursuant to 28 U.S.C. § 1332.

ACandS, Inc., 5 F.3d at 1263; Trentacosta v. Frontier Pac Aircraft Indus., Inc., 813 F.2d 1553, 1557 & n.4 (9th Cir. 1987); Frederick S. Wyle Professional Corp. v. Texaco, Inc., 764 F.2d 604, 609 (9th Cir. 1985). As stated previously, adidas established that there was an absence of a triable issue or material fact with respect to its independent development of the Predator fins, including their structure and design. (*Id., at 2-3, 8, n.4, 15-17*). Having carefully reviewed the papers and exhibits submitted, the Court concludes that Brown failed to present any evidence or authority to reconsider the Court's independent-development ruling. For the above reasons, the Court denies Brown's motion to reconsider.

CONCLUSION

Having carefully reviewed the papers submitted and the law, and for the reasons stated herein and in the Summary Judgment Decision, the Court denies Brown's motion to reconsider. Because this order discloses the proprietary and confidential information of Brown, adidas, and ESN, the Court directs the Clerk of Court to

file this order under seal. If Brown wishes to appeal this Court's ruling, he must file the notice of appeal in compliance with Fed. R. App.P. 3 & 4(a).

IT IS SO ORDERED.

DATED: 07-07-00

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Marilyn L. Huff, Chief Judge

UNITED STATES DISTRICT COURT